Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

Docket No. 79-469

NORMAN B. OPPENHEIMER,

Petitioner,

versus

ELECTRO-NUCLEONICS, INC., AVELINO FIEL, Estate of ALFRED BERG, Deceased, BERTHA L. BERG as Executrix, HAROLD WM. HARRISON, HERBIERTO FEBUS BERNARDINI, MARIANO CABRERA, CONBOY, HEWITT, O'BRIEN AND BOARDMAN, ESQS., a Partnership,

Respondents.

BRIEF OF RESPONDENTS ELECTRO-NUCLEONICS, INC., AND BERTHA L. BERG AS EXECUTRIX OF THE ESTATE OF ALFRED S. BERG, DECEASED, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit, and the judgment of the United States District Court for the Southern District of New York are annexed to Petitioner's Writ of Certiorari as Appendix A and Appendix B, respectively.

Questions Presented

(1) Whether the United States Supreme Court should exercise its discretion in granting a Writ of Certiorari when the questions decided below are in accord with decisions of this Court?

(2) Whether the United States Supreme Court should exercise its discretion in granting a Writ of Certiorari when the questions decided below are in accord with state law?

(3) Whether the United States Supreme Court should exercise its discretion in granting a Writ of Certiorari when the questions decided below are not in conflict with decisions of other Courts of Appeals on the same subject?

(4) Whether the United States Supreme Court should exercise its discretion in granting a Writ of Certiorari when the proceedings below were conducted in accordance with the Federal Rules of Civil Procedure?

Rule Involved

U.S. Sup. Ct. Rule 19, 28 U.S.C.A.

Counter-Statement of the Facts

The facts, in so far as they are relevant, are succinctly set forth in the decision appealed from. Accordingly, we disagree largely with Petitioner's statement of facts. Yet, we will, for the most part, allow Petitioner these indiscretions.

However, the discussion on pages 6 and 7 of Petitioner's statement of facts with respect to the ultimate disposition of the shares represented by Warrant No. W-104 (the "warrant") must be corrected. In September, 1974, at the conclusion of the interpleader action, Petitioner received all the shares issuable upon the exercise of the warrant and promptly sold them (A383).* In sharp contrast to the conspiracy alleged in Petitioner's statement of facts, his own trial testimony unequivocally states that he had no evidence that any defendant, other than Rodriquez, had contact with defendant Fiel (A392).

ARGUMENT

POINT I

The decision below is in accord with applicable state law.

The District Court found, on the basis of the evidence produced at the trial of the interpleader action, that Petitioner personally endorsed the warrant, thereby placing it into the stream of commerce essentially in bearer form (A278). In accordance with Uniform Commercial Code §8-311, Petitioner is estopped from asserting the ineffectiveness of his assignment.

Petitioner contends that Electro-Nucleonics, Inc. ("Electro"), acted improperly in failing to recognize his ownership under the decree of the Puerto Rican court. In

* References preceded by "A" refer to the appendix filed in the recent appeal to the Second Circuit, 78-7497. References preceded by "R" refer to the appendix filed in Petitioner's earlier appeal under File No. 74-2222.

making a most elementary business judgment, Electro recognized that Fiel, the party presenting the warrant, was not a party to the Puerto Rican action. Moreover, Uniform Commercial Code §8-403(c) states "the issuer is *not* charged with notice of the contents of any court record or file . . ." [Emphasis added].*

POINT II

No important questions of federal law are raised in the petition, and the result below is consistent with decisions of this Court and other U.S. Courts of Appeals.

The District Court found that Petitioner had neither proved nor alleged a sale of securities in reliance upon Electro's Registration Statement. Accordingly, his allegations of securities law violations fail based upon this Court's opinion in *Blue Chip Stamps, et al.* v. *Manor Drug Stores,* 421 U.S. 723 (1975), and that of the Second Circuit in *Birnbaum* v. *Newport Steel Corp.,* 193 F.2d 461 (2nd Cir. 1952), *cert. den'd,* 343 U.S. 956 (1952).

Petitioner contends that Electro's interpleader action, as a part of the ever-widening conspiracy he imagines, constituted some unspecified violation of his civil rights. Yet, as Petitioner's own record discloses, Electro was threatened with litigation if Fiel's exercise of the warrant was not honored (A322). In such situations, Electro's right to institute the interpleader action, and require Petitioner and Fiel to litigate their claims among themselves, is overwhelmingly supported by local and Federal law. Fed.R.Civ.P. 22 (see also New Jersey Study Comment No. 4 to N.J.S.A. §12A:8-403). The District Court's finding that the bringing of this action was proper and in accordance with applicable law (A277) was affirmed by the Court of Appeals.

* See also Judge Canella's order dated March 31, 1970, denying Petitioner's motion for summary judgment (A120-127).

Upon deposit of the warrant into court, Electro-Nucleonics was discharged from all liability except to the party whom the court adjudged was entitled to execute it (R94). In accordance with that decree, at the conclusion of the interpleader action, all the shares to which Petitioner was entitled upon exercise of the warrant were delivered to him. He shortly thereafter sold them (A383).

POINT III

There has been no departure from the usual course of accepted judicial proceedings.

The petition is largely centered upon an alleged departure from the course of accepted judicial proceedings. As an example, Petitioner now contends that he was enjoined from serving subpoenas on witnesses proposed to appear on his behalf at trial.* It is clear that Petitioner's own conduct—his repeated violations of the interpleader order—caused these restrictions (R63). It was Petitioner's abuse of process which caused Judge Lasker, in his July 24, 1972 memorandum decision, to observe:

> "In view of the history of Oppenheimer's harassing tactics, he is ordered not to make any further motions in this action prior to trial without the express ap-

* The injunction was not as severe as Petitioner may lead one to believe (R62; R94; A152), and was lifted after trial of the interpleader.

proval of the court. The instant motions, as the other judges of this court have observed as to prior motions, are an intolerable abuse of the court's process and a waste of judicial resources." (R267-268).

The record below amply discloses that Petitioner, who often proceeded *pro se,* was offered every conceivable indulgence by the many judges who presided over the numerous proceedings which he had brought.

In over ten years of litigation, Petitioner has appeared on motions before five District Court judges, and, on trial, before a sixth, who all recognized that his damages were inflicted by no one except himself and those individuals associated with the abortive Puerto Rican lease transaction. Typical of these findings is Judge Motley's statement that:

> "As the record discloses, Oppenheimer, who was then representing himself, sought unsuccessfully on several occasions to set aside Judge Metzner's order, thus delaying prompt disposition of the interpleader action (A274) . . . Had plaintiff not impeded the progress of the interpleader action by repeatedly seeking to set aside Judge Metzner's order, he might have been able to secure title and possession of the warrant earlier." (A279).

Petitioner had appealed virtually every ruling of the Southern District which was adverse to him; yet the Second Circuit unanimously affirmed. Even if it could be assumed that all these decisions were wrong, there was not such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. *Cory Corp.* v. *Sauber,* 363 U.S. 709, 713 (1960).

Conclusion

Petitioner fails to present a question of federal or state law appropriate for consideration by this Court. Accordingly, this petition for Writ of Certiorari should be denied.

Respectfully submitted,

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